84-107

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SANTIAGO SANCHEZ-COLON,
Petitioner,

VS.

JOHN O. MARSH, IN HIS OFFICIAL CAPACITY
AS SECRETARY OF THE UNITED STATES ARMY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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July 1984

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QUESTIONS PRESENTED

1. Whether the Circuit Court below has applied the correct interpretation to Federal Rule of Civil Procedure 52 (a) in determining whether the trial court's findings of fact are clearly erroneous in a Title VII case.

2. Whether the Circuit Court below may adopt a standard for review of a trial court's decision whereby the decision may be affirmed an appeal even though the decision is not the "correct" decision.

3. Whether the Circuit Court below may deem a finding of fact "clearly erroneous" only if the finding is without factual support in the record of the trial court.

4. Whether the Circuit Court below has not impermissibly restricted its standards in reviewing findings of trial courts.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding (No. 83-1849) in the United States Court of Appeals for the Tenth Circuit were the Petitioner Santiago Sanchez-Colon and the Respondent John O. Marsh, Secretary of the United States Army, in his official capacity; the Respondent was represented by the office of the Judge Advocate General, Department of the United States Army.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Santiago Sanchez-Colon respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review that court's judgment of April 25, 1984, in Santiago Sanchez-Colon vs. John O. Marsh, in his Official Capacity as Secretary of the United States Army, No. 83-1849.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 733 F.2d 78 and appears as Appendix A to this petition. The style of the case erroneously appears as Santiago Colon-Sanchez vs. Marsh. The opinion of the United States District Court for the Western District of Oklahoma is not reported and appears as Appendix B to this petition.

JURISDICTION

The judgment of the Circuit Court of appeals below was entered on April 25, 1984. On May 10, 1984, petitioner filed a petition for rehearing out of time and the same appears as Appendix C.

Petitioner filed a Motion to File Petition for Rehearing out of time simultaneously with his Petition for Rehearing and appears as Appendix D. No ruling thereon has yet been rendered. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, Title 42 U.S.C. § 2000 e-16(a); Title 42 U.S.C. § 2000 e-16(c), 42 U.S.C. § 2000 e-16(d) and (e) and Federal Rule of Civil Procedure 52 (a). These provisions are set forth in Appendix E to this petition.

STATEMENT OF THE CASE

Where the word "Respondent" is used herein, the same will refer to the United States Army military reservation at Ft. Sill, Lawton, Oklahoma. The petitioner herein was at the time of the acts complained of herein, a civilian employee at said installation.

DISTRICT COURT PROCEEDINGS

On the 7th day of October, 1980, Santiago Sanchez-Colon (hereinafter "Sanchez") filed his Complaint in the trial court below invoking Title VII of the Civil Rights Act of 1964 (42 U.S.C., § 2000 *et seq.*) which provides for affirmative relief against discrimination in employment based on race, sex, religion, national origin and color. Sanchez alleged in said Complaint that he was denied promotion by the Respondent to a GS-09 position based on his race (Hispanic) in July 1979. Sanchez further alleged that he was better qualified to fill the Quality Assurance Specialist (Mechanical) vacancy than the Caucasian male, Mr. Alvin R. Shuler (hereinafter "Shuler") who was promoted to the said vacancy.

The case proceeded to a bench trial where the said trial court found in favor of the Respondent on May 3, 1983 after having taken the matter under consideration. A Motion for and Brief in support of a New Trial were filed by Sanchez on May 12, 1983 and the Motion was denied on June 6, 1983.

The testimony of Sanchez at the said trial established that he was familiar with the duties of the Quality Assurance Specialist vacancy by virtue of his having been employed in the Maintenance Division,

Directorate of Industrial Operations (DIO) in different jobs by Ft. Sill since 1974 through the date of the trial. The vacant position of Quality Assurance Specialist came under the jurisdiction of the Maintenance Division, DIO.

Sanchez is a Hispanic male of Puerto Rican origin who was 46 years of age at the time of the alleged discrimination herein complained of which discriminatory acts occurred on or about the 12th day of July, 1979. At the time of the alleged discriminatory acts, Sanchez held the position of Equipment Repair Inspector at WG-10 salary in the Quality Assurance Branch of the Maintenance Division of the Directorate of Industrial Operations (DIO) at Ft. Sill. The vacant position was not a supervisory position at the time it became vacant in July 1979 but was (as the name implies) a "specialist" position.

Sanchez is a U.S. Army retiree. The testimony of Sanchez at the trial showed that he was familiar with the duties of the vacant position by virtue of his having been employed by Ft. Sill since October 1974 and having been "detailed" to the vacancy after the incumbent had left the position which had created the vacancy. Mr. Shuler had occupied a position similar to Sanchez' position just prior to being promoted and was also a U.S. Army retiree. He had no previous experience in the position greater than that of Sanchez. Under the promotion system utilized by Ft. Sill during the time in question, the Ft. Sill Civilian Personnel Office (CPO) selected the three (3) best qualified applicants for the vacancy and forwarded the names of the applicants to the hiring authority along with their personnel files.

The hiring authority in this case consisted of a single male caucasian (Mr. Edward N. Brous) who was Chief of Quality Assurance. A job description existed for the vacancy and was the guide presumably used by Mr. Brous in the promotion process.

Sanchez lodged his first charge of employment discrimination with the local Ft. Sill Equal Employment Opportunity Office (EEO) after he was notified that his application for the vacancy was unsuccessful. That complaint resulted in a superficial local EEO investigation and in an unfavorable local EEO disposition. Sanchez then lodged an appeal of that unfavorable EEO disposition to the United

States Army Civilian Appellate Review Office, Dallas, Texas (USACARO). An investigator from the USACARO visited Ft. Sill and conducted a separate investigation. The USACARO investigation resulted in a report consisting of approximately 85 pages with findings that Sanchez has been discriminated against by Mr. Brous based upon race and national origin and recommended to the Ft. Sill Commanding General that Sanchez be granted the relief he sought. That recommendation was rejected by the said Commanding General and Sanchez thereafter instituted his district court Complaint.

Sanchez was not told by the hiring authority that the position for which he was applying was a position that required an inordinate amount of "supervisory" skills. The job description which guided Mr. Brous showed that the vacant position required other skills equally as important as supervisory skills without one skill dominating the other. Mr. Brous testified at the trial below that he virtually failed to consider the appellant's military record in evaluating Sanchez' qualifications for the vacancy. The vacancy was not a "supervisory" position at the time at issue herein and only *after* the position was filled by Mr. Shuler was the position officially made a supervisory position.

Sanchez had a high school diploma and had been a mechanic or motor sergeant with a mechanic's Military Occupational Specialty (MOS) since high school to the present and testified at the trial that his mechanic's career began in high school. At the time of trial herein, Sanchez was occupying the very position he had previously been denied and had so occupied the position since May 1982; this result came about when Mr. Shuler was transferred to a different position at Ft. Sill during the pendency of the suit. Sanchez held the position on a "temporary" basis but was not receiving the GS salary the position called for but instead was receiving his WG salary.

Sanchez discharged and retired from the U.S. Army after twenty (20) years with a rank of Sergeant E-6 and testified at the trial that an Army Motor Sergeant had to have considerable supervisory skills. Mr. Shuler, on the other hand, had a GED diploma and never possessed a mechanic's MOS during his twenty (20) year Army career; he discharged from the Army with a rank of Sergeant E-8. Mr. Shuler's exit rank of Sergeant E-8 as compared to Sanchez' exit rank of Sergeant E-6 apparently impressed the hiring authority and the trial

court even though Mr. Brous testified that he had only a general knowledge of what a Sergeant E-8's duties might be in the Army as opposed to what Mr. Shuler actually did during his Army career.

All the witnesses at the trial called by Sanchez who worked with him testified that they had no difficulty in understanding Sanchez either orally or in writing; yet the trial court apparently placed great weight on the self-serving testimony of Mr. Brous when Mr. Brous testified that he had difficulty in communicating with Sanchez. There was no trial testimony by Mr. Brous that during the time of trial and in the months immediately preceding that he had any difficulty communicating with Sanchez while Sanchez held the exact position previously denied him on a temporary basis for almost one (1) year at the time of trial. There was trial testimony that some forms completed by Mr. Shuler were not properly done.

At the trial, Sanchez introduced copies of written forms required for his position at the time he made application for the vacancy and except for the hiring authority, no testimony was adduced at the trial that his forms were not understood.

Sanchez, during his lengthy military career, received specialized training, numerous awards and letters of achievement. Sanchez was also subject to have his performance rated on an annual basis and the said ratings reflect that Sanchez received his highest performance ratings just prior to the period of employment discrimination then received drastically poorer ratings during the said two (2) periods thereafter.

Sanchez, prior to his temporary appointment to the Quality Assurance Supervisory position in May, 1982 held the title of Automotive Equipment Repair Inspector. In that position, Sanchez had occasion to note deficiencies in design of the equipment he inspected. Sanchez testified that as a part of his duties, he reported such deficiencies to higher authority with recommendations for improvement in design; no such actions were testified to by Mr. Shuler. Such actions are voluntary on the part of the employee.

A union official called by Sanchez at the trial testified that the DIO received "by a long ways" more complaints than any other department under the union jurisdiction. The same union official further testified that he had received a separate employment discrim-

ination complaint based on Hispanic national origin which complaint related to qualifications of the respective applicant. The aforesaid other Hispanic employee (Mr. Herman Herrera) testified as to his qualifications and as to his own personal difficulties in being promoted by Maintenance Division, DIO supervisors.

Mr. Brous testified at the trial below that *his* military experience was a two (2) year term as an Army draftee in 1957-59. Sanchez had previously testified as to his service on Command Maintenance Management Inspection (CMMI) Team and its function. Mr. Brous dismissed Sanchez' qualifications and experience as a CMMI Team member even though Mr. Brous also testified that he did not know what a CMMI Team does. Mr. Shuler testified at the trial below that he had no formal training in the repair of vehicles and that he never had the MOS of a motor sergeant although he testified that he had been "detailed" into a motor sergeant's position for a period of six (6) months. Mr. Shuler conceded that a motor sergeant requires supervisory skills. Mr. Shuler had the MOS of a surveyor.

Mr. Joe Garza is the Ft. Sill Equal Employment Opportunity officer. His duties include making a recommendation to the Ft. Sill Commanding General concerning the aforementioned USACARO report. Mr. Garza's recommendations in the instant case were based on what other Ft. Sill personnel had told him about the nature of the vacancy and the qualifications of the applicants. The reports from other personnel, relied on by Mr. Garza, also place inordinate weight to the administrative nature of the vacancy even though the vacancy was not a supervisory position.

Mr. Garza conceded that in making his recommendation to the Commanding General that he did not take into consideration the fact that Mr. Shuler never possessed a Mechanic's MOS during his army career nor did he inquire about the nature of the Quality Assurance Specialist position; Mr. Garza further conceded that he had "no earthly idea" of what a Sergeant E-8 might do in the army but was relying on what other Ft. Sill personnel told him about what an E-8 might do.

Mr. Garza further testified that he could not compare an E-8 versus an E-6 without knowing more about the duties of such an E-8 or E-6 yet in his recommendation he failed to inquire into such

differences. Mr. Garza had relevant information relating to the USACARO investigation yet failed to provide such relevant information to the USACARO investigator. Mr. Garza received the complaint of Sanchez in the initial stages of the complaint as the local EEO officer; he testified at the trial that he really had not sufficient information to render an informed decision at that stage of this case even though it is his duty to do so and even though he did render a decision.

Mr. Garza dismissed the Tables presented and introduced into evidence by Sanchez as to Ft. Sill's distribution of the work force by ethnic race, sex and grade as not being statistically significant.

Mr. Garza conceded that based on the Tables and statistical data presented and introduced by Sanchez that Hispanics in GS-09 positions at Ft. Sill are "under represented" but denied that the doctrine of "disparate impact" was at work therein although he testified that he was unable to rebut any assertion that the doctrine was at work at Ft. Sill. Mr. Garza stated that such statistical data was "a matter of concern".

The record supports the contention that Sanchez was better qualified "mechanically" than Shuler.

THE DECISION BELOW

The circuit court below rendered a written opinion affirming the dismissal of Sanchez' Complaint by the trial court. The Circuit Court set forth the criteria and standards it felt bound by in rendering its ruling on appeal. In doing so the circuit court stated in effect as follows: (1) The trial court evidence must be viewed in the light most favorable to the Respondent; (2) The trial court findings are presumptively correct and should not be set aside on appeal unless they are clearly erroneous; (3) The trial court decisions need *not* be "correct" but only "permissible" in light of the evidence; (4) A trial court's finding of fact may be deemed "clearly erroneous" only if the finding is without factual support in the record or if the Circuit Court below on the entire evidence is left with the definite and firm conviction that a mistake has been made and (5) The Circuit Court below has established for itself a "very limited and narrow role" in reviewing findings of a trial court on appeal.

The Circuit Court below thereafter reviewed the errors alleged by petitioner to have been committed by the trial court and the Circuit Court below thereafter concluded that the trial court record supported the dismissal of Sanchez' Complaint by the trial court and affirmed.

REASONS FOR GRANTING THE WRIT

This case presents important issues meriting this Court's review. The Tenth Circuit Court's decision, if not reversed, would permit the appellate process in the Circuit Court below to be unduly restrictive and narrow such as to render an appeal therein an exercise in futility from the standpoint of Federal Rule of Civil Procedure 52(a) in virtually any type of case where a trial court's findings of fact are at issue.

I. THE COURT BELOW HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The sweeping standards set forth by the Circuit Court below in reviewing decisions by the court below are so narrow and restrictive such as to render an appeal a virtual exercise in futility for unsuccessful litigants in the trial court. One of the cases relied upon by the Circuit Clerk below is *Joyce v. Davis*, 539 F.2d 1262 (10th Cir., 1976) at page 1264. This case led the Circuit Court below to conclude that it "must view the evidence below in the light most favorable to the prevailing party". And in reaching that conclusion the Circuit Court below relied upon *Hart v. Western Investment and Development Company*, 417 F.2d 1296 (10th Cir., 1969) at page 1300. Neither the *Joyce, supra,* case nor the *Hart, supra,* case involved a Title VII case or factual issues even remotely similar to the instant case. Nothing in Federal Rules of Civil Procedure 52(a) appears to require such a conclusion or standard of review on appeal.

The Circuit Court below relies upon *Walker v. Wiar*, 276 F.2d 39 (10th Cir., 1960) at page 41 to support its standard of review that a trial court's findings of fact are "presumptively correct". In the *Walker, supra,* case the Circuit Court below cites a 1939 8th Circuit case and 1949 8th Circuit case to bolster its standard of review as stated. The *Walker, supra,* case and the two (2) 8th Circuit cases cited

therein involved rulings prior to the enactment of Title VII of the civil rights acts of 1964 and none of the said cases involves the factual issues presented herein. And, nothing in Federal Rule of Civil Procedure 52(a) requires the "presumptively correct" standard applied by the Circuit Court below in the *Walker, supra,* case or in the instant case.

The Circuit Court below departs farthest from the accepted and usual course of judicial proceedings when it holds that trial courts' "decisions in this regard need not be 'correct,' only 'permissible' in light of the evidence". Does that mean that the Circuit Court below is in the habit of regularly affirming "incorrect" decisions of trial courts of the Circuit? What other conclusion can be drawn from such a pronouncement by the Circuit Court below? As authority for such a standard of review, the Circuit Court below relies upon *Volis v. Puritan Life Ins. Co.*, 548 F.2d 895 (10th Cir., 1977) at page 901. Nowhere in Federal Rules of Civil Procedure 52(a) is there language to support such a standard of review. The *Volis, supra,* case involved a contract of insurance dispute and the issues therein were not related in any way to the issues in the instant case.

Finally, the Circuit Court below cites *Farmers and Bankers Life Ins. Co. v. Allignham*, 457 F.2d 21 (10th Cir., 1972) at page 24 and *Clancy v. First National Bank of Colorado Springs*, 408 F.2d 899 (10th Cir., 1969) at page 903 as authority for its review standard wherein the Circuit Court states that a finding of fact may be deemed "clearly erroneous" only if the finding is without factual support in the record or if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made. This latter standard appears to be a permissible standard for review but when taken with the other standards for review above set forth, may be considered as not controlling. The *Farmers, supra,* case and *Clancy, supra,* case were factual situations totally dissimilar to the instant case.

There are two (2) factual issues in particular, although not necessarily the *only* issues in dispute, which both the trial court and the circuit court below appear to literally ignore or at least find of such insignificant import as to brush aside as scarcely worthy of mention but which to the petitioner appear to be of paramount significance.

There is an additional factual issue which was decided adversely to the petitioner without any valid explanation by either the trial court or the Circuit Court below.

The two factual issues seemingly ignored are (1) why was the vacancy changed to a supervisory position *after* Mr. Shuler was selected and not before? The courts below scarcely mention that fact or justify the change based on "realities" of the job. Such a maneuver by the respondent smacks of cover up and (2) the petitioner occupied the very position denied to him for almost a year at the time of trial and held the position on a "temporary" basis through the time of oral argument in the Circuit Court below. If petitioner were so unqualified for the vacancy, how could he occupy the exact position, which was denied him, for more than two years with no apparent difficulty?

The findings of the trial court and the opinion of the Circuit Court below agree that the petitioner was better qualified from a "mechanical" and "technical" point of view than Mr. Shuler. In dispute is the finding that Mr. Shuler had greater "administrative" expertise. The vacancy was not advertised as a "supervisory" position nor was the job description for the vacancy heavily weighted toward "administrative" expertise. Why then do the trial court and the Circuit Court below dwell upon Mr. Shuler's superior "administrative" abilities? Since the job description was not heavily weighted toward "administrative" skills, why attach such importance to such skills? Such was the pretext offered by the respondent at the trial and which apparently was accepted by the trial court and affirmed on appeal by the Circuit Court below. Would it not be just as logical (or more logical) to attach greater significance to the "mechanical" expertise of Sanchez since the vacancy was advertised as a "mechanical" position?

With so many hours of testimony at the trial and voluminous exhibits introduced, the trial court was able to discern findings of fact such as to allow it to render a judgment favorable to the respondent. And with the standards of review adopted by the Circuit Court below, the affirmance thereof was a mere formality.

For the above and foregoing reasons, this Honorable court must exercise its powers of supervision to reverse the Circuit Court below

in order to restore the proper application of Federal Rules of Civil Procedure 52(a) in appellate review in the 10th Circuit Court.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully Submitted

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APPENDICES

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4-25-84 **APPENDIX A** 83-1849

United States Court of Appeals

For the Tenth Circuit

SLIP OPINION

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SANTIAGO COLON-SANCHEZ,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 83-1849
	)	
JOHN O. MARSH, JR., in his official capacity as SECRETARY OF THE UNITED STATES ARMY,	)	
	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
For the Western District of Oklahoma
Civil 80-1145-D

Richard Vallejo of Oklahoma City, Oklahoma, Attorney for Plaintiff-Appellant.

John S. Albanese (Peter B. Loewenberg with him on the brief), of Washington, D.C., Attorneys for Defendant-Appellee.

Before BARRETT, LOGAN, and SEYMOUR, Circuit Judges.

BARRETT, Circuit Judge.

Santiago Colon-Sanchez (Sanchez) appeals from a judgment of the district court for the Western District of Oklahoma denying him recovery for alleged discrimination in employment by the United States Army in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5 et seq.

At the time of the alleged discriminatory acts, Sanchez, a Hispanic male, was employed as a Civil Service civilian at the United States Army military reservation at Ft. Sill in Lawton, Oklahoma. Sanchez held the position of Equipment Repair Inspector in the Quality Assurance Branch of the Maintenance Division of the Directorate of Industrial Operations (DIO) at Ft. Sill.

On May 31, 1979, the position of Quality Assurance Specialist became vacant at Ft. Sill. Sanchez applied for this position, and was referred to the selecting official, Edward N. Brous, as one of three "best qualified" candidates for the job. Also referred to Brous were Harold D. Meyers and Alvin R. Shuler, both of whom were employed at Ft. Sill as Equipment Repair Inspectors. After reviewing the personnel files and conducting interviews with each candidate, Brous selected Shuler for the Quality Assurance Specialist position.

Subsequently, Sanchez filed a complaint with officials at Ft. Sill, claiming that he was not selected for the position because of his Puerto Rican heritage. An official of the United States Army Appellate Review Office (USACARO) investigated his complaint, and recommended that the Commander of Ft. Sill find that Sanchez was subjected to discrimination. Ft. Sill's Equal Employment Opportunity Officer, however, conducted his own investigation and disagreed with the USACARO probe; he recommended that the Commander issue a finding of "no discrimination" in Sanchez's case. Ultimately, the Commander followed the EEO recommendation and arrived at a "no discrimination" finding.

Sanchez then filed his complaint in the United States District Court for the Western District of Oklahoma claiming that he had been discriminated against on the basis of his race. After a two-day trial to the court, the district judge entered judgment against Sanchez and dismissed his complaint.

In its opinion accompanying the judgment, the district court set out its reasoning for denying Sanchez recovery. Following the burden of proof guidelines established for discriminatory hiring and promotion cases in *McDonnell Douglas Corp. v. Green*, 411 U.S.

792 (1973), the district court found that Sanchez had established a *prima facie* case of discrimination, but that the United States Army had produced sufficient legitimate, nondiscriminatory reasons for its actions to rebut the presumption of discrimination created by Sanchez' *prima facie* case (Opinion at 2). Hence, the district court recognized its duty to decide whether Sanchez had met his ultimate burden of establishing that the United States Army had intentionally discriminated against him, by showing that the Army's stated reasons for its actions were pretextual, or a mere cover-up for a racially discriminatory decision (*Id.* at 3). After a lengthy discussion of the proof adduced at trial, the district court concluded that Sanchez had not met this burden (*Id.* at 9). Consequently, the court entered judgment in favor of the United States Army (*Id.* at 9-10).

On appeal, Sanchez challenges the court's factual conclusions: (1) that the United States Army presented sufficient legitimate and nondiscriminatory reasons for its actions, and (2) that Sanchez failed to meet his ultimate burden of establishing intentional discrimination on the part of the Army.

I.

Initially, it will be instructive for us to set forth the standards used in reviewing the district court's findings. An appellate court must view the evidence below in the light most favorable to the prevailing party. *Joyce v. Davis,* 539 F.2d 1262, 1264 (10th Cir. 1976). The district court's findings based upon this evidence are presumptively correct, and should not be set aside on appeal unless they are clearly erroneous. *Walker v. Wiar,* 276 F.2d 39, 41 (10th Cir. 1960). The court's decisions in this regard need not be "correct," only "permissible" in light of the evidence. *Volis v. Puritan Life Ins. Co.,* 548 F.2d 895, 901 (10th Cir. 1977). A finding of fact may be deemed "clearly erroneous" only if the finding is without factual support in the record, (*Farmers & Bankers Life Ins. Co. v. Allignham,* 457 F.2d 21, 24 (10th Cir. 1972)), or if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made. *Clancy v. First Nat'l Bank of Colorado Springs,* 408 F.2d 899, 903 (10th Cir. 1969). Counsel would be well advised that the cases cited above delineating our review of trial court findings establish a very limited and narrow role for us on appeal.

II.

Sanchez contends that the district court erred in finding that the United States Army produced sufficient legitimate and nondiscriminatory reasons for its actions to rebut Sanchez's *prima facie* case. The court noted that, according to Brous's testimony, he selected Shuler instead of Sanchez because of Shuler's superior administrative experience and skills. Hence, according to Brous, Shuler was better qualified than Sanchez. Certainly, Shuler's allegedly superior qualifications constituted a legitimate, nondiscriminatory reason for the Army's actions. As the Supreme Court has noted, "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1980) (citation omitted). We hold, therefore, that the district court did not err in finding that the Army met its burden of production by presenting legitimate, nondiscriminatory reasons for its actions.

When the employer in a Title VII suit meets this burden of production, the plaintiff must be given the opportunity to show that the stated reason was merely a pretext for prohibited discrimination. *McDonnell Douglas v. Green, supra* at 804; *Mohammed v. Callaway*, 698 F.2d 395, 399 (10th Cir. 1983). "This burden now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." *Texas Dep't of Community Affairs v. Burdine, supra* at 256.

This court has pointed out various items of evidence which may be relevant to such a showing of pretext. These items include: (1) the employer's prior treatment of the plaintiff, (2) the employer's general policy and practice with respect to minority employment, particularly statistics reflecting a general pattern and practice of discrimination, (3) disturbing procedural irregularities, and (4) the use of subjective criteria, especially when used to evaluate candidates that are not objectively equally qualified. *Mohammed v. Callaway, supra*. It should be stressed that this list, of course, is not intended to be exclusive; nor should each, or any individual item be required proof in a given case. The list is merely illustrative of methods by which pretext may be shown.

As an initial proposition, it is important to note that the district court found both Sanchez and Shuler *qualified* for the position of Quality Assurance Specialist (Opinion at 7-8). This finding is supported by the evidence. Both men were recommended to Brous as among the three best-qualified applicants. Both men had significant experience in the areas of equipment maintenance.

It is impossible, however, to conclude that the two men were *identically* qualified for the position. As the district court noted, Sanchez had strong "mechanical or technical" credentials, while Shuler possessed strong "administrative" credentials (*Id.* at 7-8). This conclusion is also supported by the record. Sanchez has spent most of his adult working life in the field of mechanical maintenance and inspection. (*See* R., Vol. V.) Shuler, on the other hand, spent many years in supervisory and administrative roles, with responsibilities over both personnel and equipment. (*See* R., Vol. VII.)

The question then becomes whether Brous acted properly in making his subjective decision to give greater weight to Shuler's strong administrative credentials than to Sanchez's mechanical credentials. We have held that where applicants are equally qualified, it is within the employer's discretion to choose among them so long as the decision is not based on unlawful criteria.[1] *Burrus v. United Telephone Co. of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir. 1982). *See also Texas Dep't of Community Affairs v. Burdine, supra* at 259.

The job description prepared by the Army for the position of "Quality Assurance Specialist (Mechanical)" clearly indicates that administrative, and to a lesser extent, supervisory responsibilities constitute a large portion of the duties to be performed by a Specialist. Among other things, the description states that a Specialist must perform "administrative and technical work" relating to the moni-

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[1] As previously noted, the district court observed that Sanchez and Shuler possessed particularly strong credentials in different areas. Hence, the two men could not, in our view, be deemed "equally qualified" in the strictest sense. Our holding in *Burrus*, however, does not require that candidates be *identically* qualified, but that they each possess the objective qualifications for a particular position. It is in this latter sense that Sanchez and Shuler may be deemed to have been "equally qualified" for the Quality Assurance position.

toring and maintenance of equipment. In addition, a Specialist's duties include reviewing contractual documents, evaluating and revising quality control procedures, conferring with management, and advising the Branch Chief on various matters. (Plaintiff's Ex. 2, sub. Ex. 6.) Based upon the job description, we agree with the district court's finding that Brous acted properly in subjectively concluding that Shuler was "more qualified for the job because of his superior administrative background and that this outweighed [Sanchez's] more extensive technical background." (Opinion at 9.)

Sanchez attempted to show that the above-stated reason for hiring Shuler was pretextual, or merely a cover-up for a racially discriminatory motive. The district court, however, found that Sanchez had not met his burden of proof in this regard. We agree.

Sanchez places great weight upon statistics introduced by him at trial which reflect a proportionate underrepresentation of Hispanic employees at Ft. Sill when compared to the civilian Hispanic labor force in Lawton, Oklahoma. The district court, however, found that this data was not probative on the issue of discrimination because it did not "deal with the labor pools from which either entry level or promotion candidates [were] drawn" (Opinion at 9.) Although we cannot agree with the district court's conclusion that these statistics were wholly without probative value,[2] we must conclude that their value was, indeed, slight. As the Supreme Court has noted, "[S]tatistics . . . come in an infinite variety . . . [T]heir usefulness depends on all of the surrounding facts and circumstances." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 (1977). In the present case, Sanchez's statistics did not reflect the number of *qualified* Hispanics competing for employment at Ft. Sill, a fact which reduces significantly their value for the purposes of showing intentional discrimination. *See id.* at 339-40 n.20.

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[2] Title VII imposes no requirement that an employee population mirror the general population. Nonetheless, evidence of longlasting and gross disparity between the composition of a work force and that of the general population may be significant. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40, n.20 (1977).

Sanchez's similar reliance upon the USACARO investigation which resulted in a finding of discrimination in his case is equally unpersuasive. It must be recalled that a subsequent EEO investigation conducted by Ft. Sill's Equal Employment Opportunity Officer resulted in the opposite conclusion. The district court, however, referred to neither investigation in its opinion accompanying the judgment. The court's findings and conclusions demonstrate that a *de novo* review was provided, and that Sanchez was given the full opportunity to present his case. *See Nulf v. International Paper Co.*, 656 F.2d 553, 563 (10th Cir. 1981). Sanchez cites no authority indicating that the USACARO investigative report was entitled to deference from the court. Indeed, we have declined to hold that formal EEOC determinations are entitled to such weight; rather, their value rests within the discretion of the trial judge. *Id.*

We have reviewed Sanchez's remaining contentions. We agree with the district court's conclusion that they are insufficient to show the pretextual nature of Brous's decision to hire Shuler. The record supports the court's finding that Shuler was promoted based upon qualifications, not race.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

SANTIAGO SANCHEZ-COLON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO.
	)	CIV-80-1145-D
	)	
JOHN O. MARSH, JR., in his official capacity as SECRETARY OF THE UNITED STATES ARMY,	)	
	)	
	)	
Defendant.	)	

JUDGMENT

In accordance with the Opinion of the Court filed herein of even date Plaintiff's action is dismissed.

DATED this 3rd day of May, 1983.

FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SANTIAGO SANCHEZ-COLON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO.
	)	CIV-80-1145-D
	)	
JOHN O. MARSH, JR., in his official capacity as SECRETARY OF THE UNITED STATES ARMY,	)	
	)	
	)	
Defendant.	)	

OPINION

Plaintiff brought this action pursuant to Sections 706(f) and 717 of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-5(f) and 2000e-16(c) and (d). The Plaintiff alleges that he was denied promotion by the Defendant as a result of unlawful discrimination on the basis of his Hispanic national origin. There is no question of jurisdiction of this Court, and the parties have stipulated that the Plaintiff has exhausted his administrative remedies. The Court finds, in accordance with the stipulation, that the Plaintiff has exhausted his administrative remedies and concludes that the Court has jurisdiction.

The Plaintiff complains that he was denied promotion to the position of Quality Assurance Specialist (Mechanical), a GS-9 level position, in the Quality Assurance Branch of the Maintenance Division of the Directorate of Industrial Operations at the Ft. Sill Army Reservation. The alleged discrimination occurred in July, 1979, when Mr. Edward N. Brous, Chief of Quality Assurance, selected Alvin R. Shuler for said position instead of Plaintiff. Plaintiff seeks promotion retroactive to that time, together with back pay and legal fees. Plaintiff also seeks an injunction ordering the Defendant to eliminate the unlawful employment practice complained of.

The Court has followed herein the guidance of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) as further articulated by *Burrus* v. *United Telephone, Inc.*, 683 F.2d 339 (Tenth Cir. 1982)

and recently discussed in *U.S. Postal Service Bd. of Govs.* v. *Aikens*, __ U.S. __ (1983). Applying the method of proceeding prescribed in these cases to the promotion type situation in this case, the Court concludes that the Plaintiff has established a *prima facie* case, as the Court is satisfied that the Plaintiff, a member of the racial minority, applied for and was objectively qualified for the job promotion but was not selected and a caucasian person was selected instead of the Plaintiff. Further, following *Burrus*, supra,[1] and *Aikens*, supra, the Defendant has produced clear and substantial evidence in support of his claim that Mr. Brous' reasons for selecting Mr. Shuler were legitimate and non-discriminating, the Court being satisfied from the evidence that Mr. Shuler was objectively qualified for the position, and Plaintiff was afforded the opportunity to demonstrate that the Defendant's reasons for selecting Mr. Shuler were a mere pretext for unlawful discrimination. In this situation the Court must decide the ultimate factual issue of whether the Defendant intentionally discriminated against Plaintiff. *See U.S. Postal Service Bd. of Govs.* v. *Aikens*, supra.

The job description of a Quality Assurance Specialist then in effect shows that the major duties of the position required skills in both technical and administrative areas and that the latter bordered on a supervisory role. For technical skills, the position required familiarity with the maintenance of all the types of vehicular equipment used at Ft. Sill. As to administrative duties, the position involved reading contracts, technical orders, work orders and determining the maintenance obligations thereunder; being familiar with work load procedures and systems and advising the Chief of Quality Assurance on methods of working out quality assurance problems with contractors;

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[1] This case provides:

"If the prima facie case is established, the defendant must articulate a reason, using admissible evidence, to explain why 'the plaintiff was rejected, or someone else preferred, for a legitimate, nondiscriminatory reason.' *Texas Department of Community Affairs*, 450 U.S. at 254, 101 S.Ct. at 1094. If such a reason is proffered, in order to prevail the plaintiff must demonstrate that the defendant's articulated reason is a mere pretext for unlawful discrimination. *Id.* at 256, 101 S.Ct. at 1095. Throughout these stages, the overall burden of persuasion remains with the plaintiff. *Id.*"

monitoring and modifying the plans for special projects while such projects are in process; conducting quality audits and applying statistical methods to them. The Quality Assurance Specialist was also responsible for accepting or rejecting contract specifications and, when rejecting them, recommending changes and resolving such rejections with contract personnel, management officials and maintenance and inspection personnel. The position required some dealing with the public. Duties which bordered on supervision are described therein as follows:

> Assures that written quality control procedures are available and being utilized. Evaluates their adequacy and revises/ implements new procedures as necessary. Explains and interprets quality control procedures to maintenance and inspection personnel.

Mr. Shuler's predecessor in the Quality Assurance Specialist position had performed some clearly supervisory functions, including the preparation and submission of formal performance ratings on the Plaintiff and others. Further, approximately a year after Mr. Shuler's selection, the job description was formally changed to include first-line supervisory functions. Such change appears essentially to have been a recognition of the realities of the job and ratification of current practice. Nothing before the Court suggests that such job description change was influenced by the pendency of the complaints involved herein. Thus, the Court finds that the job sought by the Plaintiff involved duties and skills which were technical and administrative, with emphasis on the latter, and the latter tended to result in some supervision of others.

The selection process was as follows. When Mr. Wadley, Mr. Shuler's predecessor resigned, Mr. Brous conferred with the Civilian Personnel Office and applicants were sought from the entire Ft. Sill installation. Several made applications, mainly from the Quality Assurance Branch. The Civilian Personnel Office applied standard rating methods to the applicants and referred three "best qualified" (BQ) candidates to Mr. Brous. The candidates were Mr. Shuler, Plaintiff, and a Mr. Myers. Mr. Brous consulted the personnel files on each of these, made a checklist of qualities on which he rated each candidate, and prepared a set of questions with which to interview the

candidates. He then conducted interviews with the candidates. Based on the above and his knowledge of each man, Mr. Brous made his decision. Ft. Sill requested a USACARO investigation of Plaintiff's discrimination complaint which was made. The Commanding General at Ft. Sill rejected this report.

Mr. Brous testified he selected Mr. Shuler over the Plaintiff and Mr. Myers largely because of his superior administrative experience and skill and the importance of this to the position involved; the Plaintiff and Mr. Shuler both had the necessary experience in the repair and maintenance of military vehicles but the position involved required much more than this; the position did not call for the holder thereof to personally do mechanic work; both Plaintiff and Mr. Shuler had worked under him; he testified that he had experienced problems with the job performance of Plaintiff in the matter of his writing and the completeness of his reports but none of this problem with Mr. Shuler; that Mr. Shuler required less supervision in the discharge of his responsibilities than the Plaintiff; that Mr. Shuler was a better communicator than the Plaintiff and this was considered in his selection; that Plaintiff's race or national origin had nothing to do with the selection he made and the same did not enter into his considerations.

The Plaintiff alleges that Mr. Brous had pre-selected Mr. Shuler, that is, that Mr. Brous had made up his mind to select Mr. Shuler before he had considered the other candidates. There is no competent evidence to support this allegation. The Plaintiff's evidence in this regard consisted only of testimony by fellow employees who testified they heard Mr. Wadley, then the Quality Assurance Specialist, say that he was going to recommend Mr. Shuler for the position and that no one else needed to apply. This testimony would prove Mr. Wadley's state of mind but not Mr. Brous' state of mind, and only the latter is a material issue. Mr. Brous denied receiving a recommendation from Mr. Wadley. There was no evidence that Mr. Brous' immediate superior influenced him in this selection. The Plaintiff also complained of training which Mr. Shuler received prior to his selection, primarily by virtue of his having been detailed to the job temporarily more than the Plaintiff during periods when the job was not filled by a permanent incumbent, but the Court finds that the

greater period of time Mr. Shuler was detailed to the job resulted from a standard operating procedure of Mr. Brous' which was fair to all concerned.

As to qualifications in the technical area, the Plaintiff had experience in the maintenance and inspection of many types of vehicular equipment, particularly wheeled vehicles, with less experience in tracked vehicles. His 20 years of Army service was involved almost entirely with mechanical maintenance and inspection. He was drafted in 1953, and in 1963 he became a motor sergeant in charge of a crew of mechanics, and he spent most of the next ten years in that and similar functions. When he retired in 1973, he was a staff sergeant with grade of E-6. After a short time away from the military, he went to work at Ft. Sill in a civilian capacity as a mechanic. He rose to the level of Auto Equipment Repair Inspector, grade WG-11, at the time he applied for the position of Quality Assurance Specialist. Both during his time in the Army and his time as a civilian working at Ft. Sill, Plaintiff has had a good work record and has reflected credit on the units in which he has worked. His awards, letters of commendation, and job performance evaluations, together with the testimony of fellow employees show that he was and is a valuable employee. Further, Mr. Shuler vacated the position in question approximately a year ago, and since that time, Mr. Brous has detailed Mr. Sanchez to fill the position temporarily. (The position is under review for possible elimination and so cannot and has not been filled permanently, as of the time of trial.) Based on all the evidence, the Court finds that Plaintiff was an effective, efficient, valuable employee, a credit to his unit, and an objectively qualified candidate for Quality Assurance Specialist with good credentials for the mechanical or technical aspects of the position.

Mr. Shuler's qualifications were as follows: He entered the Army in 1952, starting as a driver and clerk and rose to the grade of Staff Sergeant E-5 in 1953 (a grade which the Plaintiff took ten years to achieve), in which grade he was a Section Chief with eight or ten persons under him. He spent much of the succeeding years as an Artillery Section Chief and Chief of Survey, which involved responsibility for equipment including vehicles, both wheeled and tracked, and some maintenance therefor. He had extensive experience with administrative duties and supervision of others. After approximately

15 years in the military, Mr. Shuler was promoted to the grade of First Sergeant (E-8) in which position he acquired about seven years of experience in personnel supervision, administration including the preparation of unit paper work and correspondence, and taking an overall responsibility for a large number of enlisted personnel. The Plaintiff never served as a First Sergeant. As a First Sergeant, Mr. Shuler was responsible for 60 to 70 persons and as many as 25 wheeled vehicles and several tracked vehicles. In the last year of his 22 years of service, he was an ROTC instructor, a position in which he acquired additional experience in planning, administration and instructing. He went to work at Ft. Sill in 1974 in a civilian capacity as a mechanic's helper in the tracked vehicle shop, and has since then worked on tracked vehicle transmissions and conducted tracked vehicle inspections. Prior to his appointment as Quality Assurance Specialist, Mr. Shuler was a Heavy Mobile Equipment Repair Inspector with a WG-11 grade. He, too, had good job performance evaluations and letters of commendation from officers who had occasion to come into contact with him. In fact, when the same person evaluated both Plaintiff and Mr. Shuler, the evaluations came out about the same. Further, Mr. Shuler's commendations, including one in March, 1979, were no less glowing than Mr. Sanchez's. Based on all the evidence, the Court finds that Mr. Shuler was an effective, efficient, valuable employee, a credit to his unit, and an objectively qualified candidate for Quality Assurance Specialist with strong credentials for the administrative responsibilities of the position.

Based on these facts, the Defendant argues that Mr. Shuler had the needed technical expertise for the job, while the Plaintiff argues he had more experience in this area. The Court agrees with both contentions. As to administrative skill, the Plaintiff points to his years as a Staff Sergeant. The Court agrees that this was such as to make him objectively qualified for the job herein involved. The Defendant contends that Mr. Shuler, however, was more highly qualified than the Plaintiff in the area of administrative experience and skill and bases this contention of his longer experience as a Sergeant and, in particular, his approximately seven years experience as a First Sergeant. The Court finds that Mr. Brous could, based on the information available to him at the time of his selection, properly conclude that Mr. Shuler was more qualified in this area, which, as

indicated above, was the more important of the duties and qualifications required for the position. As a First Sergeant, Mr. Shuler would have become more familiar with Army procedures, administration and leadership than a Staff Sergeant in any capacity. The Court finds that Mr. Brous could reasonably and properly conclude that Mr. Shuler was more qualified for the job because of his superior administrative background and that this outweighed the Plaintiff's more extensive technical background.

The Court has considered the statistical evidence submitted by the parties regarding the distribution of minority populations among the various grade levels at Ft. Sill. This is not probative of either discrimination at the entry level or discrimination in promotions, as it does not deal with the labor pools from which either entry level or promotion candidates are drawn. Hence, the Court does not find that there has been shown a pattern of discrimination against minority populations at the relevant times at Ft. Sill.

The Court finds and concludes that there was no intentional discrimination against this Plaintiff in this instance as the evidence discloses that Mr. Shuler was selected by Mr. Brous over the Plaintiff for legitimate and non-discriminating reasons. There is no evidence of improper prior treatment of the Plaintiff, or of a general policy and practice or general pattern of racial discrimination at Ft. Sill or of any procedure irregularities in making the selection of Mr. Shuler. Mr. Brous employed subjective criteria to a certain extent.[2] Both Plaintiff and Mr. Shuler had worked under him. He had a position vacancy with two vital requirements, one calling for technical knowledge of vehicular maintenance and the other calling for administrative capabilities with at least a flavor of supervision. Both Plaintiff and Mr. Shuler were objectively qualified in both areas, but the job description weighed heavily toward administrative ability and in this area Mr. Shuler excelled over the Plaintiff. In the circumstances of this case the Court finds valid, non-discriminatory reasons for Mr. Brous selecting Mr. Shuler over Plaintiff and finds that his reasons were not

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[2] See *Mohammed v. Callaway*, 698 F.2d 395 (Tenth Cir. 1983) and *Verniero v. Air Force Academy School District #20*, F.2d , (Tenth Cir. 1983).

a mere pretext for unlawful discrimination. With this determination of the ultimate factual issue, Plaintiff is not entitled to the requested relief.

Hence, the Court concludes that judgment should be entered for the Defendant herein. The Court will enter a separate judgment to this effect.

DATED this 3rd day of May, 1983.

FRED DAUGHERTY
UNITED STATES DISTRICT JUDGE

APPENDIX C

NO. 83-1849

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SANTIAGO SANCHEZ-COLON,

Plaintiff/Appellant,

VS.

JOHN O. MARSH, IN HIS OFFICIAL CAPACITY
AS SECRETARY OF THE UNITED STATES ARMY,

Defendant/Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

PETITION FOR REHEARING OF PLAINTIFF/APPELLANT

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Attorney for Plaintiff/Appellant

May, 1984

PETITION FOR REHEARING

Pursuant to Federal Rules of Appellate Procedure, Nos. 35(a), (b) and (c) and 40(a), the appellant Santiago Sanchez-Colon (hereinafter "Sanchez") hereby submits his Petition for Rehearing and Suggestion for Rehearing by the Court in Banc. The judgment of the 3 judge panel of Circuit Judges Barrett, Logan and Seymour was filed in the Circuit Court on April 25, 1984 and was received by regular mail by the undersigned counsel for appellant on April 30, 1984.

Sanchez initially desires to inform this Honorable court that the Clerk of the Court has erroneously misspelled the name of Sanchez on the cover sheet of the opinion of the Court. The true and correct spelling should be Santiago Sanchez-Colon and not Santiago Colon-Sanchez.

It would appear to the appellant that several points of law and facts have been overlooked or misapprehended by the court or the same were deemed to be of such insignificance by the court that scant attention has been paid to same.

At the outset, it must be noted that at oral argument and in the two briefs filed by Sanchez, it was stressed that Sanchez is filling the exact position which was denied him which denial resulted in these proceedings. Sanchez has been filling the position since May of 1982 by reason of the fact that the incumbent (Mr. Shuler) had vacated the position. Sanchez fills the position now and has continuously done so since May 1982. At oral argument, counsel for defendant/appellee stated to the court that Sanchez no longer filled the position. That assertion by the appellant was not then correct nor is it correct at the time of this writing. This Honorable Court, in its written opinion appears to attach no significance to that fact.

This court's written opinion also approves of the trial court's failure to be impressed by the USACARO report which report recommended that Sanchez be granted the relief sought by Sanchez (See page 9 and 10 of written opinion). Sanchez' brief in chief established that the local EEO officer (Mr. Joe Garza) failed to provide relevant information to the USACARO investigator during the investigator's fact finding process (See page 9 and 10 of Sanchez' brief in chief). At

page 9 and 10 of this court's written opinion, it is stated that Sanchez' reliance on the USACARO recommendations is "unpersuasive" and further states that a "subsequent investigation by" Mr. Garza reached the opposite conclusion. At page 9 of Sanchez' brief in chief, the "subsequent investigation" resulted from statements and other conclusions drawn from other personnel at Ft. Sill and those statements and conclusions also placed inordinate weight to the superior "administrative" skills of a Sergeant E-8 as opposed to a Sergeant E-6 even though the particular E-8 in the instant case (Mr. Shuler) had an Army MOS of a surveyor and not a mechanic's MOS whereas Sanchez began his mechanic's career in high school and continued his mechanic's career throughout his 20 year Army tenure.

This court's written opinion does not even mention the fact that the vacant position was a "mechanical" position at the time it was advertised but was formally changed to a "supervisory" position *after* Mr. Shuler was promoted to the vacancy. Sanchez' suggestion that such a maneuver on the part of Ft. Sill was a "cover up" (See page 18 of Sanchez' brief in chief) to justify its selection of Mr. Shuler instead of Mr. Sanchez is one explanation of why such a change took place. There is no alternate explanation of such conduct on the part of Ft. Sill at the trial of the case, nor by the trial court nor by this Court. Such conduct on the part of Ft. Sill is apparently of such little significance that no mention of it need be made although Sanchez devoted considerable time at the trial and in his briefs to this court in order to seek justification for such conduct.

At page 4 and 5 of this Court's written opinion, there is set forth the criteria by which this court reviews decisions of the district courts of this circuit. The cases therein cited are said to establish a "very limited and narrow role" for this court to follow. While recognizing this court's position on its appellate role, Sanchez does not concede that the evidence in his trial precludes reversal of the trial court below nor does Sanchez concede that the standards as cited therein are calculated to elicit a response by this Court to issues deemed crucial by Sanchez and his counsel.

This court at page 5 of its written opinion follows the same reasoning as the trial court in stating that "Shuler's superior administrative experience and skills" made Shuler more qualified than San-

chez for the vacant position. That statement overlooks the fact Mr. Brous, the hiring authority, did not in fact know what Mr. Shuler's administrative or supervisory experiences were (See Sanchez' brief in chief, page 7).

At page 6 of this court's written opinion, there are listed certain items of evidence which may be relevant to show pretext as set forth in *Mohammed v. Callaway*, 698 F.2d 395, 399 (10th Cir., 1983). While recognizing that such criteria do not constitute *all* evidence which might show pretext, Sanchez asserts that all four of the criteria listed on page 6 were present in the trial below yet this court in its written opinion, criteria No. 1 and No. 3 were not even mentioned and evidence in the record in support of criteria No. 2 is seen by the trial court and this Court as "slight" although the statistics regarding minority hiring cited in the record are so glaring as to defy explanation (See Sanchez' brief in chief, page 11).

At page 6 and 7 of this court's written opinion, it is stated that the trial court found that both Sanchez and Shuler *qualified* for the vacant position whereas the actual fact is that at the trial, Ft. Sill witnesses attempted to show that Sanchez was *unqualified* (See brief in chief of Sanchez, page 7). Such attempts at the trial are further evidence of bias on the part of Mr. Brous and such attempts further show pretext on the part of Ft. Sill to justify the decision of Mr. Brous not to promote Sanchez to the position of Quality Assurance Specialist.

At page 7 of this court's written opinion, there are references made to Sanchez' strong "Mechanical or Technical" credentials and Shuler's strong "administrative" credentials. If Mr. Shuler's strong administrative credentials became apparent at *trial*, they were not apparent at the time of the alleged acts of discrimination perpetrated against Sanchez, since as hereinbefore pointed out, Mr. Brous was not even aware of what Mr. Shuler's duties in the Army actually were; Mr. Brous merely *assumed* that an E-8 had more administrative experience than an E-6. Completely overlooked is the fact that Mr. Shuler testified at the trial that a motor sergeant requires supervisory skills; Sanchez was a motor sergeant for approximately the latter one-half of his army career. Thus the question of "whether Mr. Brous acted properly in making his subjective decision to give greater weight to Shuler's strong administrative credentials than to Sanchez'

mechanical credentials'' requires a close examination of Sanchez' briefs submitted heretofore. A close examination of same would leave no room for discretion on the part of Mr. Brous and shows that Sanchez was discriminated against by Ft. Sill because of his race.

SUGGESTION FOR REHEARING IN BANC

The appellant herein, Santiago Sanchez-Colon, respectfully requests that the Court in Banc consider the instant Petition for Rehearing. Although Title VII cases under the civil rights act of 1964 are not new to this court, they constitute an important body of law and this Court's decisions involving such cases affect literally countless thousands of employees in the area comprising the 10th Circuit's geographical area. The instant proceeding therefore involves questions of exceptional importance for the court in banc.

It is therefore respectfully requested that the court in banc consider this petition for rehearing.

Respectfully submitted

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Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Petition for Rehearing of Plaintiff/Appellant was mailed this 9th day of May, 1984 to the office of John S. Albanese and Peter B. Loewenberg, Attorneys for Defendant/Appellee at the Department of the Army HQDA(DAJA-LTC) Room 24D437, Pentagon, Washington, D.C., 20310 by depositing same in the United States mail with postage thereon fully prepaid.

RICHARD VALLEJO

APPENDIX D

NO. 83-1849

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SANTIAGO SANCHEZ-COLON,

Plaintiff/Appellant,

VS.

JOHN O. MARSH, IN HIS OFFICIAL CAPACITY
AS SECRETARY OF THE UNITED STATES ARMY,

Defendant/Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION OF PLAINTIFF/APPELLANT FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

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May, 1984

MOTION OF PLAINTIFF/APPELLANT FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

The appellant, Santiago Sanchez-Colon, (hereinafter "Sanchez") hereby submits his Motion for Leave to File Petition for Rehearing Out of Time. The written opinion of the 3 judge panel of Circuit Judges Barrett, Logan and Seymour was filed in the 10th Circuit Court Clerk's office on April 25, 1984 and was received by regular mail by the undersigned counsel for appellant on April 30, 1984. On the same date, said counsel mailed a copy of said opinion to Sanchez who lives in Lawton, Oklahoma. A cover letter to Sanchez by said counsel urged Sanchez to contact said counsel after examination of the written opinion. Sanchez received said written opinion on May 2, 1984 which date is eight days after the written opinion was filed. Sanchez telephoned the undersigned counsel on May 5, 1984 requesting an appointment to discuss further proceedings in the matter. Due to conflicts in the work schedules of both Sanchez and the undersigned counsel, a meeting did not take place until May 8, 1984 at which time Sanchez instructed counsel to proceed further.

Based upon the above stated facts, Sanchez has not had a full fourteen (14) days to file his Petition for rehearing. Said Petition has been prepared as expeditiously as possible under the circumstances.

Respectfully submitted

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Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Motion of Plaintiff/Appellant for Leave to File Petition for Rehearing Out of Time was mailed this 9th day of May, 1984 to the office of John S. Albanese and Peter B. Loewenberg, Attorneys for Defendant/Appellee at the Department of the Army HQDA(DAJA-LTC) Room 24D437, Pentagon, Washington, D.C., 20310 by depositing same in the United States mail with postage thereon fully prepaid.

RICHARD VALLEJO

APPENDIX E

42 U.S.C. § 2000e-16. Employment by Federal Government

(a) All personal actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit, until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in the employment as required by the Constitution and

statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

FEDERAL RULE 52(a) OF CIVIL PROCEDURE (IN EFFECT AT TIME OF TRIAL)

Rule 52. Findings by the Court

(a) Effect

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

FEDERAL RULE 52(a) OF CIVIL PROCEDURE (Amended since date of Trial) VI. Trials

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injuctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard

shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusion of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).